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No. 15-474

In the Supreme Court of the United States

Robert F. McDonnell, *Petitioner,*
v.
United States of America, *Respondent.*

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. Counsel of record for the ACLJ has presented oral argument before this Court in numerous cases concerning the First Amendment, and ACLJ attorneys have submitted numerous *amicus* briefs in cases involving the First Amendment, including *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), and *McConnell v. FEC*, 540 U.S. 93 (2003).

The proper resolution of this case is a matter of utmost concern to the ACLJ because of the potential impact on First Amendment liberties, particularly in the context of grassroots political activity and the daily interaction between public officials and their constituencies. This Court should reverse the Fourth Circuit's disregard of this Court's controlling precedents on the First Amendment's protection of political speech.

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* The parties in this case have filed statements of blanket consent to amicus briefs. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This Court should reverse. The decision below drastically redefines the corruption *quid pro quo* from "dollars for political favors" to "dollars for influence or access," criminalizing a large swath of the American political process. The central question is whether Petitioner undertook an "official act" constituting the *quo* of forbidden *quid pro quo* corruption by granting "access" for consideration of a donor's issue. That question has tremendous implications for protected political speech occurring everyday across the nation.

The Fourth Circuit's decision dramatically expands the reach of federal corruption law to include payment by donors or activists who win "access" to public officials. The result: Protected political speech of both donors *and* public officials is now a felony.

The Fourth Circuit acknowledged the importance of proving an evidentiary link between the payor's reasonable belief in the sufficiency of an official's power and that official somehow exploiting that belief for pecuniary gain. Yet the court below *approved jury instructions omitting any such link.* The absence of that crucial link in federal corruption prosecutions will undoubtedly chill political speech between donors and officials.

If this Court accepts Respondent's expansive interpretation of "official acts," federal prosecutors may feel empowered, notwithstanding this Court's political speech jurisprudence, to selectively

prosecute based on campaign donations and private gifts alike, treating subsequent access to officeholders as comparable to corrupt official action.

ARGUMENT

This case is not about the constitutionality of objective monetary caps on gifts to public officeholders; the laws at issue prescribe no such limits. Nor is this case about the difference between gifts to a politician *personally* versus gifts to support that politician's *campaign* efforts; the laws at issue draw no such distinction. Rather, this case is about whether the pertinent federal statutes—and the First Amendment—authorize the government to criminalize a politician's grant of access—face time—to financial supporters. The answer is "No."

It is a matter of common sense and political reality that a politician will look favorably upon, and be more eager to meet with—grant "access" to—those who help that politician get elected or reelected. Such help may come in the form of favorable media coverage, voter mobilization, contribution bundling, and campaign contributions themselves. That such supporters enjoy enhanced access to the officeholder is not corruption but rather a feature—indeed a feature the First Amendment protects—of a system of elected representative governance. This Court has therefore recognized the crucial importance of

distinguishing between genuine *quid pro quo* corruption (payment of money in return for specific official action) and more generic influence. *Infra* § III(A). The decision below, however, badly misconceives that fundamental distinction, adopting as a legal rule a new line that deems "corrupt" what falls rather within the broad range of routine, and constitutionally protected, constituent influence. This Court should reverse.

I. THE UNDISPUTED FACTS SHOW A PUBLIC OFFICIAL PROVIDING ROUTINE AND LEGITIMATE ACCESS TO A DONOR.

To fully comprehend the First Amendment danger posed by the Fourth Circuit's erroneous expansion of corrupt "official acts," consider the undisputed relevant facts below: The Fourth Circuit identified three outcomes desired by the donor that would advance the donor's product.[1] Not one of these favorable outcomes materialized.[2]

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[1] No evidence suggested that the Petitioner said something in person, made a telephone call, sent an email, or sent a text message to anyone within state government *directing* that any of these three scenarios be *decided* in any way at all, much less decided in a manner favorable to the donor's company, Star Scientific. *See* JV DeLong, *SCOTUS Should Hear Robert McDonnell's Case—And He Should Win*, FORBES (Oct. 15, 2015), http://www.forbes.com/sites/jvdelong/2015/10/15/mcdonnell-and-the-supreme-court ("No actual votes or executive actions were involved, and the only *quids* the government could find for the company's *quos* consisted of a

(Footnote Continued on Next Page)

The Fourth Circuit categorized, as corrupt "official acts," "the kind of activities [Petitioner] is accused of—*e.g.*, speaking with aides and arranging meetings," *United States v. McDonnell*, 792 F.3d 478, 508 (4th Cir. 2015). The "limiting" factor the court below identified—that such access "relate" to some government action or decision on a matter before the government, *id.*, is no limit at all. Untold numbers of public officials' actions fall within the Fourth Circuit's expanded and revised version of section 201(a)(3)'s term, "official action."

The text of the statute is not so broad. Neither is the common legal meaning of these terms. A "decision or action on" a matter, 18 U.S.C. § 201(a)(3) (2012), encompasses the *act of determination* on the subject under consideration—*not the consideration itself*.[3] Here, the Petitioner merely facilitated consideration of a donor's issue by the relevant government officials.

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few trivial events, such as a pointless meeting with staff and attendance at a large reception.").

[2] Amazingly, the court below deemed Petitioner's mere question to two officials whether "they would be willing to meet with Star," after favorably commenting on Star's product, an "official act."

[3] For example, Black's Law Dictionary defines "decision" as "a judicial or agency determination *after considering* the facts and the law." BLACK'S LAW DICTIONARY 436 (8th ed. 2004) (emphasis added).

II. THE JURY INSTRUCTIONS ON "OFFICIAL ACTS" FAILED TO INCLUDE THE VERY ELEMENT THAT THE FOURTH CIRCUIT TREATED AS CRUCIAL, AN ELEMENT THAT COULD CLARIFY THE *EVANS* RULE.

In upholding the "official acts" jury instruction, the Fourth Circuit permitted the jury to find the existence of "official acts" even if it found the Appellant had no power or influence over the matters in question, as long as there was "proof of a bribe payor's subjective belief in the recipient's power or influence over a matter." *McDonnell*, 792 F.3d at 511. The Fourth Circuit elaborated: "As to the second part of the court's instruction, we have no difficulty recognizing that proof of a bribe payor's subjective belief in the recipient's power or influence over a matter will support a conviction for extortion under color of official right." *Id.* (citations omitted). Here, the court cited *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), for the proposition that "[t]he official need not control the function in question if the extorted party possesses a reasonable belief in the official's powers." *McDonnell*, 792 F.3d at 512 (citing *Rabbitt*, 583 F.3d at 1027).[4] The Fourth Circuit continued:

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[4] In *Rabbitt*, the Eighth Circuit *overturned* a conviction resting on access—introductions to decisions makers—because "[t]he Government failed to prove [the payor] entertained a reasonable belief [the payee] possessed effective

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> As the First Circuit explained in *United States v. Hathaway*, the phrase "under color of official right" "includes the misuse of office to induce payments not due." Accordingly, *the "relevant question" when contemplating a prosecution under this statute is simply whether the government official "imparted and exploited a reasonable belief that he had effective influence over"* the subject of the bribe.

Id. (quoting *United States v. Hathaway*, 534 F.2d 386, 394 (1st Cir. 1976)) (emphasis added). The *Hathaway* principle must be viewed in context: The jury instruction in *Hathaway* certainly made clear that the impartation or inducement had to come from the public official:

> Where the initiative and the inducement for the payment comes from or is on the part of the public official, and not the voluntary payment on the part of the so-called victim, it is this wrongful use of the office clothed with power of authority that converts official action into extortion.

Hathaway, 534 F.2d at 394 (quoting jury instruction); *id.* (noting a second time jury had been

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control over [awarding contracts] necessary to establish extortion 'under color of official right' in violation of the Hobbs Act." 583 F.2d at 1028.

charged that initiation and inducement of payments had to come from the official).[5]

Here, the Fourth Circuit employed the rule from *Hathaway*, that the mere subjective belief of the payor that the payee had influence or power on the matters in question could support a finding of "official action" if, and only if, the "*government official 'imparted and exploited a reasonable belief that he had effective influence over'* the subject of the bribe." *McDonnell*, 792 F.3d at 512 (emphasis added).

The critical flaw in the Fourth Circuit's reasoning lies in the fact that the jury instructions in this case *never included* the very element that the Court used to justify the instruction. In pertinent part, the instruction given to the jury charged:

> Now, you've heard this term official action several times, and I will define it for you. *And a public official need not have actual or final authority over the end result sought by a bribe payor so long as the alleged bribe payor reasonably believes that the public official had influence, power or authority over a means to the end sought by the bribe payor.*

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[5] In another case relied on by the Fourth Circuit, *United States v. Bencivengo*, 749 F.3d 205 (3d Cir. 2014), the jury instructions also included "a public official induced" language. *Id.* at 209.

J.A. 7671-72 (emphasis added). Thus, the Fourth Circuit has hitched its decision to a crucial element that *never appeared* in the jury instructions—an official "imparting and exploiting"—even though the Fourth Circuit described this very element as "*the* relevant question."

The reasoning of the First Circuit in *Hathaway* is obvious: Failure to require the jury expressly to find the all-important link between the subjective, but mistaken beliefs of the gift-giver, and the "exploitation" of that mistaken belief by the public official, would lead to the absurd result that criminality would hinge not on the government official's culpable mental state, but on the subjective (even mistaken) belief of the constituent. Thus, in this case, informal meetings, ingratiation, and episodes of collegiality between a governor and a donor were converted into federal crimes.

The result is as equally wrong as it is absurd: A gift-giver's subjective belief (in the official's influence) dictates whether the access and influence provided are either a federal felony or protected political speech. Here, there is neither evidence nor a jury finding that the public official *actually imparted and exploited* the constituent's belief. The absence of that link in federal bribery, Hobbs Act, and Honest Services prosecutions will create more than a chilling effect on the free speech rights of citizens to interact with officials, and for officials to respond to their supporters. *See Citizens United v. FEC*, 558 U.S. 310, 336 (2010) (ongoing chill upon protected speech can and must be

invalidated). It will place such relationships into a deep freeze because of the threat of federal prosecution based on the mere "subjective" and wrongheaded assumptions of supporters about the power or influence of their public officials.

The "official exploitation" factor is essential to clarify unanswered questions resulting from *Evans v. United States*, 504 U.S. 255 (1992). There, this Court determined that conviction in "under color of official action" cases does not require that the public official/recipient be the one who initiates the transaction with the payor, stating:

> [E]ven if the statute were parsed so that the word "induced" applied to the public officeholder, we do not believe the word "induced" necessarily indicates that the transaction must be initiated by the recipient of the bribe.

Id. at 266. However, *Evans* did not fully explain the dimensions of the public official's part in the forbidden *quid pro quo* equation. This case presents the opportunity for this Court to reconsider the clarifying rule urged by Justice Kennedy in *Evans* that the official must deliberately attempt to convey the idea to the payor that, absent payment, favorable treatment will not be forthcoming:

> [P]rosecution under the statute has some similarities to a contract dispute, with the

> added and vital element that motive is crucial. For example, a *quid pro quo* with the attendant corrupt motive can be inferred from an ongoing course of conduct. In such instances, for a public official to commit extortion under color of official right, *his course of dealings must establish a real understanding that failure to make a payment will result in the victimization of the prospective payor or the withholding of more favorable treatment, a victimization or withholding accomplished by taking or refraining from taking official action, all in breach of the official's trust.*

Id. at 274-75 (Kennedy, J., concurring in part, and concurring in the judgment) (emphasis added) (citations omitted).

Given the fact that the jury instructions here failed to include this kind of explanation of the *quid pro quo* agreement between the Governor and the payor, and the crucial need for clarification to avoid oppressive prosecutions that implicate fundamental political rights, this Court should reverse.

III. IN CRIMINALIZING CORRUPTION, THE GOVERNMENT MAY TARGET DOLLARS FOR OFFICIAL ACTS, BUT NOT DOLLARS FOR ACCESS.

Without doubt, campaign contributions and gifts—like media exposure and voter mobilization—

enhance constituent access and influence. All of these constitute political speech protected by the First Amendment. Time and time again, this Court has recognized that political speech "is central to the meaning and purpose of the First Amendment." *Citizens United*, 558 U.S. at 329.[6] Equally true, "[t]he right to participate in democracy through political contributions is protected by the First Amendment." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014). Of course, "that right is not absolute," and the government may regulate political contributions "to protect against corruption or the appearance of corruption." *Id.* (citation omitted). Accordingly, in drawing the lines between what the government may and may not do to target corruption, the meaning of "corruption" takes center stage.[7]

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[6] "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights." *NAACP v. Button*, 371 U.S. 415, 431 (1963). These First Amendment rights are to be robustly exercised without penalty. *McCutcheon*, 134 S. Ct. at 1449; *Davis v. FEC*, 554 U.S. 724, 739 (2008).

[7] The dissent in *McCutcheon* also recognized the "critical[] importan[ce] of the definition of "corruption."" *McCutcheon*, 134 S. Ct. at 1466 (Breyer, J., dissenting).

A. The Government May Only Target Actual or Apparent *Quid Pro Quo* Corruption—Dollars for Official Acts.

This Court has spoken on what does *not* constitute criminally targetable corruption: The government "may not target the general gratitude a candidate may feel toward those who support him or his allies, *or the political access such support may afford.*" *McCutcheon*, 134 S. Ct. at 1441 (emphasis added). This is because "[i]ngratiation and access are not corruption." *Id.* (quoting *Citizens United*, 558 U.S. at 360) (internal ellipses omitted). "[T]he possibility that an individual who spends large sums may garner influence over or access to elected officials or political parties"—comparable to a special interest group that can mobilize countless voters, or a media outlet that can boost a politician's visibility and favorability—"does not give rise to such *quid pro quo* corruption." *McCutcheon*, 134 S. Ct. at 1451 (internal quotation marks and citation omitted). "[B]ecause the Government's interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption, the *Government may not seek to limit the appearance of mere influence or access.*" *Id.* (citation omitted) (emphasis added).

This Court has also elaborated on what *does* constitute criminally targetable corruption: "Corruption is a subversion of the political process," *id.*, *not the political process itself*. *FEC v. Nat'l*

Conservative Political Action Comm., 470 U.S. 480, 497 (1985). Congress may only target "*quid pro quo* corruption or its appearance." *McCutcheon*, 134 S. Ct. at 1441; *see id.* at 1450 ("[W]hile preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—'*quid pro quo*' corruption."). "The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Id.* at 1441 (citing *Nat'l Conservative Political Action Comm.*, 470 U.S. at 497). "That Latin phrase captures the notion of a direct exchange of an *official act* for money." *Id.* (citing *McCormick v. United States*, 500 U.S. 257, 266 (1991)) (emphasis added) (internal quotation marks omitted).

It is true that "that the risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself." *McCutcheon*, 134 S. Ct. at 1460 (citing *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976)). But corruption (whether actual or apparent), and the risk of corruption are two different things. Criminally targetable corruption, that is, *quid pro quo* corruption, occurs only when public officials undertake official acts "*contrary to their obligations of office* by the prospect of financial gain to themselves or infusions of money into their campaigns." *McCutcheon*, 134 S. Ct. at 1460-61 (citing *Nat'l Conservative Political Action Comm.*, 470 U.S. at 497) (internal brackets omitted).

As Justice Kennedy explained, "[f]avoritism and influence are not avoidable in representative

politics," and "[t]he fact that speakers," *i.e.*, donors, "may have influence over or access to elected officials does not mean that these officials are corrupt." *Citizens United*, 558 U.S. at 359 (quoting *McConnell*, 540 U.S. at 297 (opinion of Kennedy, J.)).

The government's interest in combatting actual or apparent corruption, "must be limited to a specific kind of corruption—*quid pro quo* corruption—in order to ensure that the Government's efforts do not have the effect of" violating First Amendment rights. *McCutcheon*, 134 S. Ct. at 1462. "The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights." *Id.* at 1451. This Court cautioned that, "in drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *Id.* (quoting *FEC v. Wis. Right to Life*, 551 U.S. 449, 457 (2007) (opinion of Roberts, C. J.)) (internal brackets omitted).

The vitality of this line is now before this Court for consideration. The line the Fourth Circuit drew, by contrast, cuts right through the heart of political speech, association and activity; hence, this Court should reverse.

B. Targetable "Official Acts" are Policy-Altering Decisions, not Acts Demonstrating Consideration of a Donor's Desire.

The Fourth Circuit's all-encompassing "official acts" definition, if left to stand, will snatch up all sorts of protected political speech. Hardly any exchange between a donor and public official could escape its grasp. That which might escape will be chilled into silence by the glaring uncertainties and the threat of prosecution.

The term *quid pro quo* "captures the notion of a direct exchange of an *official act* for money." *McCutcheon*, 134 S. Ct. at 1451 (citing *McCormick*, 500 U.S. at 266) (emphasis added) (internal quotation marks omitted). The court below implemented its broader view of corruption by expanding the definition of "official acts," for all practical purposes, to include access, influence and favor. However, the statute defining "official acts" is not so broad, limiting an "official act" to:

> any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

18 U.S.C. § 201(a)(3).

The Fourth Circuit's error occurred when it expanded the "target" far beyond substantive displays of policy-altering action or decision-making power. In keeping with its broader, yet mistaken, view of corruption, the lower court's new "target" includes customary, procedural and functional practices transpiring every day in the offices of elected public officials "insofar as *a purpose or effect of those practices is to influence*" a "question" or "matter." *McDonnell*, 792 F.3d at 509 (emphasis added) (quoting 18 U.S.C. § 201(a)(3)). But the court's addition of general influence—a great deal more than mere judicial gloss—contradicts this Court's First Amendment jurisprudence. *See McCutcheon*, 134 S. Ct. at 1451 ("The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights."); *id.* at 1441 (government "may not target the general gratitude a candidate may feel toward those who support him or his allies, *or the political access such support may afford*." (emphasis added)); *id.* ("Ingratiation and access are not corruption.") (quoting *Citizens United*, 558 U.S. at 360) (internal ellipses omitted).

Consistent with an overinclusive definition, the district court had included this in its Circuit-approved jury instruction: "In addition, official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end." *McDonnell*,

792 F.3d at 506; *see id.* at 509-10. This instruction does more than explain the statue; it substantively changes it.

Hidden within this dangerously broad definition is a speech-chilling truth: A public official's *single* comment, telephone call, email, or text message relating to a donor's issue may be said to be "one in a series of steps to exercise influence or achieve an end," and thus "actions taken in furtherance of longer-term goals." This means that if a public official so much as emails an advisor suggesting the plausibility of a donor's request, he may be prosecuted for corruption. If he directs that a staffer be sent to a meeting hosted by a donor, or presents the donor's issue to other government officials for consideration, he has exposed himself to corruption charges. If he grants an in-person meeting to a donor: a felony.[8] By including such mundane, innocuous and non-decisive "acts" of communication and interaction somehow relating to a donor's issue, the court below expands the scope of federal anti-corruption statutes far beyond its text and purpose, defying common sense and criminalizing, *ipso facto*, the protected interaction between officials and their donors.

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[8] The requisite criminal intent in such situations could in theory be inferred, as it was here, based on the temporal proximity of the donation to the official's communication to his staffer. *McDonnell*, 792 F.3d at 519. "How close is too close" is the hazy question that will inevitably chill legitimate political speech and perplex lower courts.

As in *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999), "if the Government's interpretation were correct, it would have sufficed [for the statute] to say 'for or because of such official's ability to favor the donor in executing the functions of his office,'" *id.* at 406, as opposed to the more restrained "official acts" definition chosen by Congress. This Court should reverse and make clear that "official acts" do not include routine access, favor, and influence.

C. This Court Should Grant "Strategic Protection" to the Political Speech Criminalized and Chilled by the Court Below.

Facially, the criminal statutes at issue pose no threat to political speech. Instead, it is the manner in which the Fourth Circuit reinterpreted and applied the criminal statutes that present a danger. The sweeping language used by the court below—expanding targetable corruption by redefining "official acts"—applies to campaign donations with as much force as it applies to private gifts. *See McCutcheon*, 134 S. Ct. at 1460-61 (discussing case law demonstrating that criminally targetable *quid pro quo* corruption can occur when officials act "contrary to their obligations of office by the prospect of financial gain to *themselves* or infusions of money into *their campaigns*."). If this Court affirms, the government could then prosecute, under the guise of targeting a substantively

"revised and expanded" variation of corruption, routine First Amendment-protected political activity that this Court has repeatedly described as *not* corrupt. Acts of ingratiation, acts of granting access, acts exploring the merits of a donor's request, are all now "official acts" in the crosshairs of federal corruption statutes without regard to whether the money is given to an official's campaign or to the official directly

Where, as here, fundamental First Amendment rights of citizens and political officials are on the chopping block, this Court should err on the side of protecting from decapitation the robust, long-standing, and uncorrupted interactions that are part of our political fabric. This Court should reverse in order to provide "strategic protection" to these citizen-politician interactions, including those that reside at the margins of legitimacy.

As Justice Alito noted in *Elonis v. United States:* "We have sometimes cautioned that it is necessary to 'exten[d] a measure of strategic protection' to otherwise unprotected false statements of fact in order to ensure enough 'breathing space' for protected speech." *Elonis v. United States*, 135 S. Ct. 2001, 2017 (2015) (Alito, J., concurring in part, and dissenting in part) (quoting *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 342 (1974)). "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963)

(citations omitted). And, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* (citations omitted). As such, "political speech must prevail against laws that would suppress it, whether by design *or inadvertence*." *Citizens United*, 558 U.S. at 340 (emphasis added). This Court should err on the side of political speech, *McCutcheon*, 134 S. Ct. at 1451, and eliminate the First Amendment chill imposed by the court below.

IV. THE HISTORY AND EXAMPLES OF GIFT GIVING TO OFFICIALS IN VIRGINIA, AND OTHER STATES, AND THE STATES' RESPONSES THERETO, DEMONSTRATE THE IMPLICATIONS AND IMPROPRIETY OF RESPONDENT'S PROPOSED EXPANSION OF FEDERAL PROSECUTION POWER.

This Court is at a fork in the road. Its decision will yield one of two results: (1) Accept Respondent's proposed interpretation of "official acts," thus enabling the behemoth prosecution machine of the federal government to prosecute state officials at will, state law notwithstanding; or, (2) Reject Respondent's interpretation, thus allowing states to determine for themselves whether their officials may receive gifts and if so, how much and under what restrictions. States are the laboratories of democracy, *see New State Ice Co.*

v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), and are fully capable of such action. In fact, states are changing their laws on the subject, implementing new gift limits, or in some cases, all-out bans. Virginia serves as a salient example.

Virginia had a long history of officials receiving personal gifts while in office—a history long preceding Governor McDonnell's time in office. According to reports compiled by the Virginia Public Access Project,[9] among the top givers of personal gifts to Virginian officials were Dominion ($242,425 from 2001 to 2015), Altria Group, Inc., formerly Philip Morris Companies, Inc. ($173,420 from 2001 to 2014), the Virginia Economic Development Partnership ($111,293 from 2002 to 2012), the Virginia Trial Lawyers Association ($106,042 from 2001 to 2015), the Virginia Auto Dealers Association ($74,850 from 2001 to 2015), and Obama for America ($38,614 in 2008 to Governor Tim Kaine).

Personal gifts to Governor Tim Kaine while he was in office included gifts benefiting his family, personal items like clothing, significant travel, and a gift from a pharmaceutical company. More specifically, Governor Kaine received free use of a Caribbean vacation home valued at $18,000 from an individual in 2005; air travel from Obama for America valued at $38,614 in 2008; clothing valued

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[9] VA. PUB. ACCESS PROJECT, http://www.vpap.org.

at $3,500 from an individual in 2005 and $2,000 in 2003; lodging and meals for the candidate and his family, valued at $1,960, from the Virginia Trial Lawyers Association in 2004; and thousands of dollars in travel and/or lodging from numerous others, including $12,000 from Teva Pharmaceuticals for him to attend the Democratic Governors Association Meeting in 2006 and $1,500 for travel from an individual in 2006. He also received two nights of lodging for his wife and family from the Virginia Bar Association in 2005, tickets to a Washington Wizards basketball game valued at $850 from an individual in 2008, clothing valued at $777 from S & K Famous Brands in 2006, four cases of wine valued at $720 from McCandish Holton PC in 2007, and travel from Dominion valued at $2,038 between 2006 and 2007

Gifts to Governor Mark Warner while he was in office included $17,096 in air travel from an individual between 2002 and 2004; $11,195 in air travel between 2003 and 2004 from Armada Hoffler Enterprises, Inc.; $4,939 in air travel from Altria between 2002 and 2004; $4,736 in air travel and lodging from a union in 2004; $2,268 in "Personal Travel/Lodging/Fishing" from an individual in 2003; $4,131 in accommodations and lodging from Omni Homestead Resort in 2002; other personal air travel and lodging valued at thousands of dollars from individuals, corporations and organizations; a shotgun valued at $1,150 from Daniel Hoffler in 2002; Busch Gardens accommodations valued at $989 from Anheuser-Busch in 2002; a sculpture

valued at $750 from Genetric Inc.; lodging valued at $531 for the Governors Cup Golf Tournament from Wellmont Health Systems; clothing; clocks; family dinners; art and decorations; and sporting event tickets.

Reports detail the hundreds of thousands of dollars in personal gifts given to other Virginia office-holders, including legislators from both parties. For example, Virginia Senator Yvonne B. Miller received $81,536 in personal gifts while she was in office. Her gifts included $8,180 in gifts from Breakthru Beverage Virginia/Associated Distributors, including facials and tables at dinners; ball and gala tickets and dinners totaling $3,152 from Dominion; dinner tickets valued at $2,000 from an individual in 2004; a table at a dinner valued at $2,000 from the Virginia Beer Wholesalers Association, sporting events tickets valued at $400 from Norfolk Southern Corporation; music event tickets valued at $250 from Honda Motor Company; and other dinners, travel and lodging.

It is beyond naïve to suggest that the personal gifts made to these and other Virginia officials were not given and received with an understanding that ingratiation and access would result.[10] Even so, personal gifts like these were not illegal under

[10] Intentionally omitted from these lists are token gift items such as memorabilia, plaques, books, and gift baskets.

Virginia law at the time.[11] But that has changed, demonstrating that states are fully capable of determining their own limitations on gift giving to officials. Governor Terry McAuliffe implemented an Executive Order establishing a $100 gift limit for administration officials,[12] and the legislature has followed suit.[13]

The trend toward restricting such gifts is moving forward in other states as well. In Pennsylvania, for example, former Governor Tom Corbett was criticized for his receipt of over $11,000 in gifts from 2010 to 2011, including private jet travel, event tickets,[14] and the first lady's inaugural ball gown.[15] A particular gift-giving firm is known to lobby for a number of special interests at the state capitol. While criticized as "unseemly," Corbett maintained

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[11] Nor were such gifts unlawful under federal corruption law at the time—unless, of course, a genuinely "official act" was promised or occurred as a result.

[12] Va. Exec. Order No. 2 (2014).

[13] Patrick Wilson, *Virginia Lawmakers Approve New Gift Limit Rules*, PILOTONLINE.COM (Apr. 18, 2015), http://pilotonline.com/news/government/politics/virginia/virginia-lawmakers-approve-new-gift-limit-rules/article_3bf297a7-ac6b-5501-884b-20cc62733a51.html.

[14] *Governor Corbett, Wife Accepted $11,000 In Gifts*, CBS PITTSBURGH (Mar. 5, 2013), http://pittsburgh.cbslocal.com/2013/03/05/governor-corbett-wife-accepted-11000-in-gifts/.

[15] Wallace McKelvey, *Wolf's First Actions Include Gift Ban, Required Bidding on Legal Contracts*, PENNLIVE.COM (Jan. 20, 2015), http://www.pennlive.com/politics/index.ssf/2015/01/gov_tom_wolf_signs_gift_ban_le.html.

compliance with state reporting requirements, and at the time, Pennsylvania law had no limits on the value of gifts to executive branch officials. Responding to public concern, Governor Wolf's campaign included a proposal to ban gifts and his first Executive Order prohibited gifts for executive officials from someone "seeking to obtain business from or [who] has financial relations with the Commonwealth," or who "[h]as interests that may be substantially affected by the performance or nonperformance of the official duty of the employee."[16]

Several states (*e.g.*, Delaware,[17] Hawaii,[18] Mississippi,[19] Missouri,[20] New York,[21] Pennsylvania,[22] Vermont,[23] and West Virginia[24]) have no dollar limits on gifts given to public officials, but instead, have laws similar in nature to the federal corruption statutes at issue in this case, forbidding receipt of gifts resulting in impairment

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[16] Pa. Exec. Order No. 1 (2015).

[17] DEL. CODE ANN. tit. 29, §5806(b) (2016). The pertinent text of this law and other state law cited *infra* are set forth in the Appendix attached hereto.

[18] HAW. REV. STAT. ANN. § 84-11 (2015).

[19] MISS. CODE ANN. § 25-4-105(1) (2015).

[20] MO. REV. STAT. § 105.452(1)(1) (2016).

[21] N.Y. PUBLIC OFFICERS LAW § 73 (5) (Consol. 2015); N.Y. LEGISLATIVE LAW § 1-m (Consol. 2015).

[22] 65 PA. CONS. STAT. § 1103 (b) (2015); *id.* § 1103 (c).

[23] VT. STAT. ANN. tit. 2 § 266(a)(1)(2) (2015); 3A VT. STAT. ANN. 3-53 (2011).

[24] W. VA. CODE § 6B-2-5(c)(1) (2015); *id.* § 6B-2-5(c)(2).

of independence of judgment in the exercise of official duties, or some other language to that effect. *See, e.g.*, MO. REV. STAT. § 105.452(1)(1) (No official shall "[a]ct or refrain from acting in any capacity in which he is lawfully empowered to act as such an official or employee by reason of any gift or campaign contribution, made or received in relationship to or as a condition of the performance of an official act.").

Every state (and the District of Columbia) has restrictions on gifts to officials to some degree, except South Dakota.[25] Some states, like Ohio, in addition to certain dollar amounts and restrictions placed on gifts to legislators, OHIO REV. CODE ANN. § 102.031 (LexisNexis 2015), forbid officials to solicit or receive a "gift," and anyone from promising or giving a "gift," "that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties," *id.* § 102.03(D). Other states, like New Hampshire, one of the so-called "no, thank you" or "no cup of coffee" states, forbids gift giving to public officials altogether, and bar the receipt of gifts by public officials. *See* N.H. REV. STAT. ANN. § 15-B: 3 (LexisNexis 2016).

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[25] *See Legislator Gift Restrictions Overview*, NCSL.ORG (Oct. 1, 2015), http://www.ncsl.org/research/ethics/50-state-table-gift-laws.aspx.

> It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.

New State Ice Co., 285 U.S. at 311 (Brandeis, J., dissenting).

It is clear that there is a wide array of state legislation and ethics rules on the subject. The states are amending their laws subject to the concerns of their citizens. The expansion of "official acts" proposed by Respondent is therefore unnecessary and serves only to allow the massive federal prosecution machine to pick and choose, as it has done in this case, whom it will prosecute. Such a broad, far-reaching definition of "official acts" to include access ensures that any official providing access to a gift giver may be prosecuted, notwithstanding that his actions do not violate the laws of his own state. Accepting Respondent's proposed limitless reach is to introduce confusion, uncertainty, and the very real threat of politically motivated prosecution into the field of law already heavily legislated by the states.

V. COMMON POLITICAL INTERACTION WOULD BE SUBJECT TO FEDERAL PROSECUTION UNDER RESPONDENT'S PROPOSED EXPANSION OF "OFFICIAL ACTS."

The phrase, "any decision or action on" a matter, 18 U.S.C. § 201(a)(3), is simply not the same as a practice undertaken with the purpose or effect of influencing a matter, *McDonnell*, 792 F.3d at 509, or a practice that "*relate*[*s*] in some way to a matter," *id.* at 508 (emphasis in original). The Court need not look far to find examples of political speech in the form of everyday occurrences, which, should this Court accept Respondent's proposed definition of "official acts," would then be forbidden as corrupt.

A. The President of the United States

Reportedly:

> During President Obama's reelection campaign, in 2012, Hoffman [founder of LinkedIn] and Pincus [founder of Zynga] each gave a million dollars to Priorities USA, the Democratic Super PAC. Since then, they have had the opportunity to spend time with Obama. In a private forty-five-minute meeting in the Oval Office in 2012, Pincus gave the President a PowerPoint

> presentation on what he calls "the product-management approach to government." Obama telephones him now and then, sometimes at home, and Pincus and his wife have been Obama's dinner guests.
>
> In June, Hoffman helped organize the guest list for a dinner party for Obama in San Francisco, and he has had conversations with Obama at several meetings and dinners at the White House.

Nicholas Lemann, *The Network Man, Reid Hoffman's Big Idea*, NEW YORKER (Oct. 12, 2015), http://www.newyorker.com/magazine/2015/10/12/the-network-man. According to the article, Hoffman's company, LinkedIn, provided its data to the government, and "[e]arlier this year, a former LinkedIn executive, DJ Patil, was named to the new position of chief data scientist in the White House." *Id.*

The above-described scenario, abundantly routine in American politics, depicts money in exchange for access and influence. Under the Fourth Circuit's flawed rationale: federal felonies.

B. The Secretary of State

Another recent news article recounts how "a top contributor to the Clinton Foundation" had emailed

then-Secretary of State Hillary Clinton with information and requests for meetings. Tom Hamburger, *How Hillary Clinton Kept Her Wealthy Friends Close While at State Department*, WASH. POST (Oct. 5, 2015), https://www.washingtonpost.com/politics/how-hillary-clinton-kept-her-wealthy-friends-close-while-at-state-department/2015/10/05/5cfbe884-6930-11e5-9223-70cb36460919_story.html. Mr. Hamburger continues:

> Other [email] exchanges included references to entertainment mogul Haim Saban, who has said he would pay "whatever it takes" to propel Clinton to the White House in 2016, as well as other major Clinton Foundation donors such as Microsoft's Bill Gates, fashion industry executive Susie Tompkins Buell and Ukrainian steel magnate Viktor Pinchuk.

Id. According to the article, "The e-mails show that, in some cases, donors were granted face-to-face contact with top officials." *Id.* In the Fourth Circuit: Money in exchange for "official acts" and henceforth, corruption felonies.

Importantly, and with material similarity to the case now before this Court, "[t]he e-mails that mention donors *do not show that financial supporters were able to alter policy decisions.*" *Id.*

(emphasis added). [26] The significance of the distinction—understood by Secretary Clinton, recognized by her donors, and even acknowledged by this article's author—is precisely what escaped the Court below. *Dollars for access is not synonymous with dollars for decisive policy-altering "official acts."* The distinction makes all the difference in the world.

CONCLUSION

This case is not about limiting personal gifts to officeholders. Rather, it is about treating "speaking with aides and arranging meetings," 792 F.3d at 508, as criminal corruption despite the plain threat to First Amendment rights.

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[26] A more recent article recounts an interview with another one of Secretary Clinton's top donors, Bernard Schwartz, known for his zeal for investing in infrastructure. Max Abelson, *Top Clinton Donor Wants a Law Against $1 Million Gifts Like His*, BLOOMBERG BUS. (Feb. 8, 2016), www.bloomberg.com/politics/articles/2016-02-08/this-top-clinton-donor-wants-1-million-gifts-like-his-outlawed. According to the article, Schwartz recently gave $1 million to Priorities USA Action, a super-PAC supporting Hillary Clinton, and has given between $1-5 million to the Clinton Foundation. Schwartz explained that his donations to politicians "never bought me anything," "[b]ut it does buy people access, an ear, maybe advice." *Id.*

This Court should reverse.

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APPENDIX

APPENDIX

RELEVANT TEXT OF CERTAIN STATE RESTRICTIONS ON GIFTS TO OFFICIALS

Delaware

DEL. CODE ANN. tit. 29, §5806(b) (2016):

> No state employee, state officer or honorary state official shall accept other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following: (1) Impairment of independence of judgment in the exercise of official duties; (2) An undertaking to give preferential treatment to any person; (3) The making of a governmental decision outside official channels; or (4) Any adverse effect on the confidence of the public in the integrity of the government of the State.

Hawaii

HAW. REV. STAT. ANN. § 84-11 (2015):

> No legislator or employee shall solicit, accept, or receive, directly or indirectly, any gift, whether in the form of money, service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form, under circumstances in which it can

> reasonably be inferred that the gift is intended to influence the legislator or employee in the performance of the legislator's or employee's official duties or is intended as a reward for any official action on the legislator's or employee's part.

Mississippi
MISS. CODE ANN. § 25-4-105(1) (2015):

> No public servant shall use his official position to obtain, or attempt to obtain, pecuniary benefit for himself other than that compensation provided for by law, or to obtain, or attempt to obtain, pecuniary benefit for any relative or any business with which he is associated.

Missouri
MO. REV. STAT. § 105.452(1)(1) (2016):

No official shall:

> Act or refrain from acting in any capacity in which he is lawfully empowered to act as such an official or employee by reason of any gift or campaign contribution, made or received in relationship to or as a condition of the performance of an official act.

NEW YORK

N.Y. PUBLIC OFFICERS LAW § 73 (5) (Consol. 2015):

> No statewide elected official, state officer or employee, individual whose name has been submitted by the governor to the senate for confirmation to become a state officer or employee, member of the legislature or legislative employee shall, directly or indirectly: (a) solicit, accept or receive any gift having more than a nominal value, whether in the form of money, service, loan, travel, lodging, meals, refreshments, entertainment, discount, forbearance or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part. No person shall, directly or indirectly, offer or make any such gift to a statewide elected official, or any state officer or employee, member of the legislature or legislative employee under such circumstances.

N.Y LEGISLATIVE LAW § 1-m (Consol. 2015):

> No individual or entity required to be listed on a statement of registration pursuant to this article shall offer or give a gift to any public official as defined within this article, unless under the circumstances it is not reasonable to infer that the gift was intended to influence such public official. No individual or entity required to be listed on a statement of registration pursuant to this article shall offer or give a gift to the spouse or unemancipated child of any public official as defined within this article under circumstances where it is reasonable to infer that the gift was intended to influence such public official.

Pennsylvania

65 PA. CONS. STAT. § 1103 (b) (2015):

> No person shall offer or give to a public official, public employee or nominee or candidate for public office or a member of his immediate family or a business with which he is associated anything of monetary value, including a gift, loan, political contribution, reward or promise of future employment based on the offeror's or donor's understanding that the vote, official action or judgment of the public official or public

employee or nominee or candidate for public office would be influenced thereby.

65 PA. CONS. STAT. § 1103 (c) (2015):

> No public official, public employee or nominee or candidate for public office shall solicit or accept anything of monetary value, including a gift, loan, political contribution, reward or promise of future employment, based on any understanding of that public official, public employee or nominee that the vote, official action or judgment of the public official or public employee or nominee or candidate for public office would be influenced thereby.

Vermont

VT. STAT. ANN. tit. 2, § 266(a)(1)(2) (2015):

> It shall be prohibited conduct: (2) for a legislator or administrative official to solicit a gift, other than a contribution, from a registered employer or registered lobbyist or a lobbying firm engaged by an employer, except that charitable contributions for nonprofit organizations qualified under 26 U.S.C. § 501(c)(3) may be solicited from registered employers and registered lobbyists or lobbying firms engaged by an employer.

3A VT. STAT. ANN. 3-53 (2011):

> An appointee, while in state employ, shall not solicit or receive any payment, gift, or favor based on any understanding that it may influence any official action.

West Virginia

W VA. CODE § 6B-2-5(c)(1) (2015):

> No official or employee may knowingly accept any gift, directly or indirectly, from a lobbyist or from any person whom the official or employee knows or has reason to know: (A) Is doing or seeking to do business of any kind with his or her agency; (B) Is engaged in activities which are regulated or controlled by his or her agency; or (C) Has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his or her official duties.

W. VA. CODE § 6B-2-5(c)(2) (2015):

> Notwithstanding the provisions of subdivision (1) of this subsection, a person who is a public official or public employee may accept a gift described in this subdivision, and there shall be a presumption that the receipt of such gift does

not impair the impartiality and independent judgment of the person. This presumption may be rebutted only by direct objective evidence that the gift did impair the impartiality and independent judgment of the person or that the person knew or had reason to know that the gift was offered with the intent to impair his or her impartiality and independent judgment. The provisions of subdivision (1) of this subsection do not apply to: (A) Meals and beverages; (B) Ceremonial gifts or awards which have insignificant monetary value; (C) Unsolicited gifts of nominal value or trivial items of informational value; (D) Reasonable expenses for food, travel and lodging of the official or employee for a meeting at which the official or employee participates in a panel or has a speaking engagement; (E) Gifts of tickets or free admission extended to a public official or public employee to attend charitable, cultural or political events, if the purpose of such gift or admission is a courtesy or ceremony customarily extended to the office; (F) Gifts that are purely private and personal in nature; or (G) Gifts from relatives by blood or marriage, or a member of the same household.